UNITED NATIONS
ECONOMIC COMMISSION
FOR EUROPE

UNITED NATIONS
CONFERENCE ON TRADE
AND DEVELOPMENT

Trade Facilitation

TRADE/WP.4/INF.117/corr.1
TD/B/FAL/INF.117/Corr.1
7 January 1992

ENGLISH ONLY

TRADE FACILITATION INFORMATION

Adoption of the UNCTAD/ICC Rules on Multimodal Transport Documents

1. At UNCTAD's request document TRADE/WP.4/INF.117 containing the UNCTAD/ICC Rules for Multimodal Transport Documents is reissued for technical reasons and is reproduced in the form in which it was received by the secretariat.

GE.92- 30045

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UNCTAD/ICC Rules for Multimodal Transport Documents

INTRODUCTION

1. The ICC Uniform Rules for a combined transport document (ICC publication no 298) which are based on the Comité Maritime International (CMI) "Tokyo Rules" and the draft convention known as the "TCM"-draft, elaborated by UNIDROIT, have gained world-wide recognition and been incorporated in several widely used standard transport documents such as the FIATA combined transport bill of lading and the BIMCO/INSA *COMBIDOC*. Pending the entry into force of the United Nations Convention on International Multimodal Transport of Goods of 1980, (the "MT Convention") the Committee on Shipping of UNCTAD instructed the UNCTAD secretariat, in close co-operation with the competent commercial parties and international bodies, to elaborate provisions for multimodal transport documents based on the Hague Rules and the Hague-Visby Rules as well as existing documents such as the FBL and the ICC Uniform Rules. The UNCTAD secretariat consequently established contact with the commercial parties and a joint UNCTAD/ICC working group was created to elaborate a new set of rules.

2. The Rules are available to international trade for world-wide application and will be acceptable to the international banking community being fully compatible with the latest revision of the ICC Uniform Customs and Practice for Documentary Credits (UCP) which will become available in the near future. However, the Rules only cover a part of the customary contents of an multimodal transport contract. Thus, an MTO wishing to use the Rules as a basis for his multimodal transport contract would have to add other clauses dealing with matters such as: optional stowage, routeing, freight and charges, liens, both-to-blame collision, general average, jurisdiction and arbitration, and applicable law, to satisfy his particular needs. Such additions could, of course, also be made with respect to matters covered by the Rules, but only to the extent that they are not contradictory thereto.

Explanation of the Rules

Rule 1 - Applicability

The Rules do not apply when they are not referred to. It is possible to refer to the Rules even for port to port traffic and when unimodal transport is intended.

Parties having referred to the Rules, and thereby incorporated the Rules into their contract, must avoid inserting stipulations which derogate from the Rules and which thus would be contradictory. It is stated in Rule 1.2 that the parties by referring to the Rules agree that the Rules would supersede anything which has been stated to the contrary.

Rule 2 - Definitions

It has been thought that definitions should not include "multimodal transport" but rather focus on the "multimodal transport ***contract***".

The definition of "carrier" is included in order to distinguish any performing carrier - not identical to the MTO - from the MTO.

The definition of "MT document" includes negotiable, non-negotiable transport documents as well as the case where the paper document has been replaced by electronic data interchange messages.

The definition of "delivery" only deals with the situation at the place of destination. Since the shipper controls the handing over of the goods for carriage, and problems seldom occur in practice to determine the beginning of the carrier's period of responsiblity, it is sufficient to refer to the case when the goods are delivered to the consignee and third parties ***subsequent*** to carriage.

Rule 3 - Evidentiary effect of the information contained in the multimodal transport document

With respect to the responsibility for information in the MT document, the expression in art. 3.4 of the Hague-Visby Rules, "third party", has not been used, since the governing factor is whether or not the consignee has ***relied*** and ***acted upon*** the information and not his position as a "party" or "third party" in relation to the MTO. In particular, such an expression may be misleading where the seller has handed over the goods to the carrier and the buyer under an FOB or an FCA contract has concluded the contract of carriage. In such a case, the FOB/FCA-buyer - although relying on the information in the MT document - could not be considered a "third party".

Rule 4 - Responsibilities of the multimodal transport operator

The period of responsibility includes the whole time when the MTO is in charge of the goods. The particular problem when the goods are delivered at destination is covered by the definition of "delivery".

The words "within the scope of his employment" and "for the performance of the contract" would limit the vicarious liability of the MTO. However, it should be observed that these expressions may well be given a different interpretation in different jurisdictions. In particular, it is uncertain under some laws whether the MTO would be responsible for theft by his employees or other persons acting in the performance of the contract.

The modalities of delivering the goods to the consignee have been clearly set forth with reference to different types of ***negotiable*** MT documents and to ***non-negotiable*** MT documents. It should be observed that the modalities of delivery are different in these cases. A particular reference to the replacement of paper documents by electronic data interchange messages has been made.

Rule 5 - Liability of the multimodal transport operator

The Hague and Hague-Visby Rules, in art. IV (4), contain a long list of defences which apply to the benefit of the carrier. With the exception of the particular defences of error in navigation and management of the vessel (nautical fault) as well as of fire (art. IV (4) (a) and (b)), the Hague-Visby Rules imply for all practical purposes a liability of the carrier for presumed fault or neglect. In any event, the Rules would have to ensure that the vessel-operating MTO would benefit from the same defences which would have applied to a contract for a unimodal sea transport and that a non-vessel operating MTO (NVO-MTO) would have the possibility of instituting recourse actions against the actual (performing) carrier basically according to Rules which are compatible with the Rules determining his own liability. These objectives would - although not exactly, but still for all practical purposes - be reached if the defences of nautical fault and of fire are clearly mentioned combined with a liability based upon presumed fault or neglect. A complete incorporation of the so-called network liability principle, taking all modes of transport into consideration, would be far too complicated. In any event, mandatory provisions applicable to unimodal transport would supersede the Rules (cf. Rule 13).

In view of the fact that the carrier's liability is based upon the principle of presumed fault - and not on the strict "common carrier" liability - it has been deemed unnecessary to burden the text with specific exceptions from liability of the kind mentioned in the Hague Rules (art. IV (4) (c-p)). However, should an operator choose to list in his document some of the typical situations for non-liability as appear from the Hague Rules this would not be contradictory in the sense of Rule 1.2 provided the text of Rule 5.1 is maintained.

In order to make the basis of liability compatible with the Hague-Visby Rules, an exemption from liability is expressed in Rule 5.4 under the heading "Defences for carriage of goods by sea or inland waterways". Here, the two fundamental defences for nautical fault and fire are mentioned. These defences are, as in the Hague-Visby Rules, subject to the overriding requirement that, when the loss or damage has resulted from unseaworthiness of the vessel, the multimodal transport operator can prove that due diligence has been exercised to make the vessel seaworthy at the commencement of the voyage. The words "actual fault or privity of the carrier" imply that the MTO will only be liable in case of acts or omissions occurring on the ***managerial*** level in his company. However, the result would be the same in most jurisdictions according to general principles of law which would render contractual provisions exempting a party from liability invalid in cases of loss or damage caused by personal wilful misconduct or gross negligence. The basis of liability expressed in the Hamburg Rules art. 5.1 and the MT Convention art. 16 has been used to set forth the general principle of a liability for presumed fault or neglect.

With respect to liability for delay it should be noted that such liability is not expressly referred to in the Hague-Visby Rules and that, in various jurisdictions, it is uncertain whether the Hague-Visby Rules cover such liability. In Rule 5.1 it is stipulated that the MTO should be relieved from liability for loss following from delay unless the consignor made a declaration of interest in timely delivery accepted by the MTO. The problem of a possible conflict with mandatory law is taken care of by Rule 13 containing a general provision dealing with that problem.

The Hamburg Rules art. 5.3 and the MT Convention art. 16.3 contain provisions converting pending delay into a right for the claimant to treat the goods as lost. The period has been set at 90 days in the MT Convention, while the period is only 60 days in the Hamburg Rules. The longer period of 90 days has been chosen for the conversion in order to avoid that conversion occurs under the ***multimodal*** transport contract before such a conversion has been possible under any underlying ***unimodal*** transport contract. This will facilitate recourse actions by the MTO against his subcontractors. It should be observed that conversion only takes place in the absence of proof that the goods in fact have not been lost.

The stipulations in Rule 5.5 with respect to assessment of compensation reflect the main principle of international conventions and national laws dealing with this problem. The method to assess partial damage has not been dealt with. Individual MTOs may choose to deal with this problem in additional stipulations in their MT documents.

Rule 6 - Limitation of liability of the multimodal transport operator

Rule 6 has been based on the limitation provisions of the Hague-Visby Rules including the so-called "container formula" meaning that the claimant could use the units inside the container for limitation purposes provided they have been mentioned in the transport document. Since it is intended that the Rules should also cover multimodal transport ***not*** including sea transport, the CMR limit of liability of 8,33 SDR per kilogramme has in this case been used. It should be observed that this provision does not only serve to ***increase*** the per kilogramme limitation but also to ***reduce*** the effect which the "container formula" might lead to. The average weight of units in containers in a number of trades is stated to be about 50 kilogrammes and, if the "container formula" applies, this would mean 100 SDR if the limitation amount equals 2 SDR and 460.5 SDR if the limitation amount equals 8.33 SDR. These amounts should be compared with the limitation of the Hague-Visby Rules which amounts to 666.67 SDR.

It should be noted that the Rule provides limitation of liability not only for loss of or damage to the goods and delay in delivery, but also for ***consequential*** loss. Physical damage or loss may well result in various indirect losses which under various jurisdictions may not be excluded by principles to limit the exposure of the liable party and a monetary limitation of this type of liability is therefore appropriate. As has been said, the combined unit and per kilogramme limitation of the Hague-Visby Rules applies together with the so-called "container formula" using the units inside the container for limitation purposes when they have been mentioned in the transport document. Also, the higher per kilogramme amount 8.33 SDR per kilogramme applies where the multimodal transport does not involve sea transport. However, another monetary limit may apply when loss or damage could be localized to a particular stage of the transport, where according to an applicable international convention or mandatory national law such other limit of liability is stipulated. This serves to ensure that ***both parties*** will have access to such higher or lower limit of liability as they would have had if they had concluded a contract of carriage for the relevant segment of the transport.

Liability for delay in delivery or consequential loss is limited to an amount not exceeding the equivalent of the freight charged under the multimodal transport contract. Since it should not be possible for the claimant to get the "freight" limitation in addition to the unit and per kilogramme limitation, Rule 6.6 provides for an aggregation of the limits so that they may never exceed the limit of liability for total loss of the goods.

Rule 7 - Loss of the right of the multimodal transport operator to limit liability

The provision in Rule 7 on loss of the right to limit liability ensures that the right to limit liability is preserved when the blameworthy behaviour has not occurred on the managerial level but only on the part of the MTO's servants or agents. For this purpose the word "personal" has been added before the words "act or omission". Thus, a distinction is made between the MTO's own behaviour and the behaviour of others, and the MTO does not lose his right to limit liability in cases where he is only vicariously liable for acts or omissions of other persons.

Rule 8 - Liability of the consignor

This Rule makes the consignor liable under the principle that he is deemed to have guaranteed to the MTO the accuracy of all information given with respect to the goods and, in particular, their dangerous character. The consignor's duty to indemnify the MTO against loss resulting from wrong information in these respects is not limited to cases where inaccurate information is given but also applies when the information is inadequate. The consignor remains liable even if he has assigned his rights under the multimodal transport contract to someone else by transferring the document. The fact that the MTO may proceed against the consignor does not in any way prevent him from holding other persons liable as well, for instance under the principle that anyone who tenders goods of a dangerous nature to the MTO under the applicable law could become liable in tort.

Rule 9 - Notice of loss of or damage to the goods

With respect to notice of loss of or damage to the goods a distinction has been made between apparent and non-apparent loss or damage. In the former case, notice should be given in writ-

ing to the MTO when the goods were handed over to the consignee. In the latter case, notice should be given within six consecutive days after the day when the goods were handed over to the consignee. In case of late notice, the MTO would have established a ***prima facie*** case to the effect that it is presumed that no loss or damage has occurred unless the contrary could be proven by the claimant. The Rule does not deal with actions by the MTO against the consignor and therefore no period for notice of such claims has been provided for.

Rule 10 - Time-bar

The time-bar has been set at 9 months. The Hague-Visby Rules provide for a one-year limit and the MT Convention for a two-year limit. A time-bar of 9 months had to be chosen in order to ensure that the MTO would have adequate possibilities to institute recourse actions against the performing carrier. In the absence of any legal provision protecting the MTO's recourse possibilities as aforesaid, a shorter period has to be chosen than the period which applies under mandatory law to the performing carrier.

Rule 11 - Applicability of the rules to actions in tort

The MTO would also need to be protected from claims when they relate to the performance of the contract but nevertheless the claimant seeks to avoid the Rules by founding his claim in tort. The Rule will not work when there is no contractual relationship between the MTO and the claimant. However, it contains an important protection for the MTO against a possible circumvention of the Rules by the person who has agreed to be bound by the Rules.

Rule 12 - Applicability of the rules to the multimodal transport operator's servants, agents and other persons employed by him

This Rule purports to protect the servants and agents and other persons employed by the MTO, and thereby indirectly the MTO himself, by stipulating that the same protection which applies to the MTO would also apply to the benefit of "any servant, agent or other person whose services the multimodal transport operator has used in order to perform the MT contract". Also in these cases it does not matter whether such claims are founded in contract or in tort. This Rule is of the same essence as the so-called Himalaya-clauses which are usually to be found in the bills of lading and other transport documents. It should be noted that the carrier is given the same protection under the Hague-Visby Rules even in the absence of a clause. But it is uncertain, at least in some jurisdictions, whether the protection also applies to "independent contractors" as distinguished from "servants or agents". It is particularly important that the protection in case of a multimodal transport contract is not limited only to "servants or agents", since the MTO frequently engages various sub-contractors in order to perform the contract. In Anglo-American law, some difficulties may arise to make this particular Rule effective in view of the difficulties in obtaining protection for third parties by contractual arrangements. This might require particular techniques in order to obtain the desired protection when English or United States law applies to the carriage, e.g. to stipulate that the MTO, when agreeing with the consignor to apply Rule 12, has done so as an agent or a trustee of the other persons concerned.

Rule 13 - Mandatory law

This Rule only serves as a reminder. Mandatory provisions of international conventions or national law which may apply to the ***multimodal*** transport contract will supersede the Rules. It could be argued that the multimodal transport contract is a contract of its own type and that therefore no infringement of mandatory law applicable to ***unimodal*** transport could occur. However, the "conversion" of a unimodal carrier into an MTO may be considered an unacceptable way to avoid mandatory law and that therefore mandatory law, in such a case, would defeat some of the stipulations of these Rules. If it does, the Rules will become ineffective but only to such extent.

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UNCTAD/ICC Rules for Multimodal Transport Documents

1. Applicability

1.1. These Rules apply when they are incorporated, however this is made, in writing, orally or otherwise, into a contract of carriage by reference to the "UNCTAD/ICC Rules for multimodal transport documents", irrespective of whether there is a unimodal or a multimodal transport contract involving one or several modes of transport or whether a document has been issued or not.

1.2. Whenever such a reference is made, the parties agree that these Rules shall supersede any additional terms of the multimodal transport contract which are in conflict with these Rules, except insofar as they increase the responsibility or obligations of the multimodal transport operator.

2. Definitions

2.1. Multimodal transport contract (multimodal transport contract) means a single contract for the carriage of goods by at least two different modes of transport.

2.2. Multimodal transport operator (MTO) means any person who concludes a multimodal transport contract and assumes responsibility for the performance thereof as a carrier.

2.3. Carrier means the person who actually performs or undertakes to perform the carriage, or part thereof, whether he is identical with the multimodal transport operator or not.

2.4. Consignor means the person who concludes the multimodal transport contract with the multimodal transport operator.

2.5. Consignee means the person entitled to receive the goods from the multimodal transport operator.

2.6. Multimodal transport document (MT document) means a document evidencing a multimodal transport contract and which can be replaced by electronic data interchange messages insofar as permitted by applicable law and be,

(a) issued in a negotiable form or,

(b) issued in a non-negotiable form indicating a named consignee.

2.7. Taken in charge means that the goods have been handed over to and accepted for carriage by the MTO.

2.8. Delivery means

(a) the handing over of the goods to the consignee, or

(b) the placing of the goods at the disposal of the consignee in accordance with the multimodal transport contract or with the law or usage of the particular trade applicable at the place of delivery, or

(c) the handing over of the goods to an authority or other third party to whom, pursuant to the law or regulations applicable at the place of delivery, the goods must be handed over.

2.9. Special Drawing Right (SDR) means the unit of account as defined by the International Monetary Fund.

2.10. Goods means any property including live animals as well as containers, pallets or similar articles

of transport or packaging not supplied by the MTO, irrespective of whether such property is to be or is carried on or under deck.

3. Evidentiary effect of the information contained in the multimodal transport document

The information in the *MT document* shall be ***prima facie*** evidence of the taking in charge by the MTO of the goods as described by such information unless a contrary indication, such as "shipper's weight, load and count", "shipper-packed container" or similar expressions, has been made in the printed text or superimposed on the document. Proof to the contrary shall not be admissible when the *MT document* has been transferred, or the equivalent electronic data interchange message has been transmitted to and acknowledged by the consignee who in good faith has relied and acted thereon.

4. Responsibilities of the multimodal transport operator

4.1. Period of responsibility

The responsibility of the MTO for the goods under these Rules covers the period from the time the MTO has taken the goods in his charge to the time of their delivery.

4.2. The liability of the MTO for his servants, agents and other persons

The multimodal transport operator shall be responsible for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the contract, as if such acts and omissions were his own.

4.3. Delivery of the goods to the consignee

The MTO undertakes to perform or to procure the performance of all acts necessary to ensure delivery of the goods:

(a) when the *MT document* has been issued in a negotiable form "to bearer", to the person surrendering one original of the document, or

(b) when the *MT document* has been issued in a negotiable form "to order", to the person surrendering one original of the document duly endorsed, or

(c) when the *MT document* has been issued in a negotiable form to a named person, to that person upon proof of his identity and surrender of one original document; if such document has been transfered "to order" or in blank the provisions of (b) above apply, or

(d) when the *MT document* has been issued in a non-negotiable form, to the person named as consignee in the document upon proof of his identity, or

(e) when no document has been issued, to a person as instructed by the consignor or by a person who has acquired the consignor's or the consignee's rights under the multimodal transport contract to give such instructions.

5. Liability of the multimodal transport operator

5.1. Basis of Liability

Subject to the defences set forth in Rule 5.4 and Rule 6, the MTO shall be liable for loss of or damage to the goods, as well as for delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Rule 4.1., unless the MTO proves that no fault or neglect of his own, his servants or agents or any other person referred to in Rule 4 has caused or contributed to the loss, damage or delay in delivery. However, the MTO shall not be liable for loss following from delay in delivery unless the consignor has made a declaration of interest in

timely delivery which has been accepted by the MTO.

5.2. Delay in delivery

Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case.

5.3. Conversion of delay into final loss

If the goods have not been delivered within ninety consecutive days following the date of delivery determined according to Rule 5.2., the claimant may, in the absence of evidence to the contrary, treat the goods as lost.

5.4. Defences for carriage by sea or inland waterways

Notwithstanding the provisions of Rule 5.1. the MTO shall not be responsible for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:

- act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship,
- fire, unless caused by the actual fault or privity of the carrier,

however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the MTO can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.

5.5. Assessment of compensation

5.5.1. Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with the multimodal transport contract, they should have been so delivered.

5.5.2. The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

6. Limitation of liability of the multimodal transport operator

6.1. Unless the nature and value of the goods have been declared by the consignor before the goods have been taken in charge by the MTO and inserted in the *MT document*, the MTO shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

6.2. Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the *MT document* as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.

6.3. Notwithstanding the above-mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the MTO shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.

6.4. When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the MTO's liability for such loss or damage shall be deter-

mined by reference to the provisions of such convention or mandatory national law.

6.5. If the MTO is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the MTO shall be limited to an amount not exceeding the equivalent of the freight under the multimodal transport contract for the multimodal transport.

6.6. The aggregate liability of the MTO shall not exceed the limits of liability for total loss of the goods.

7. Loss of the right of the multimodal transport operator to limit liability

The MTO is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the MTO done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

8. Liability of the consignor

8.1. The consignor shall be deemed to have guaranteed to the MTO the accuracy, at the time the goods were taken in charge by the MTO, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion in the *MT document*.

8.2. The consignor shall indemnify the MTO against any loss resulting from inaccuracies in or inadequacies of the particulars referred to above.

8.3. The consignor shall remain liable even if the *MT document* has been transferred by him.

8.4. The right of the MTO to such indemnity shall in no way limit his liability under the multimodal transport contract to any person other than the consignor.

9. Notice of loss of or damage to the goods

9.1. Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the MTO when the goods are handed over to the consignee, such handing over is ***prima facie*** evidence of the delivery by the MTO of the goods as described in the *MT document*.

9.2. Where the loss or damage is not apparent, the same ***prima facie*** effect shall apply if notice in writing is not given within 6 consecutive days after the day when the goods were handed over the consignee.

10. Time-bar

The MTO shall, unless otherwise expressly agreed, be discharged of all liability under these Rules unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with Rule 5.3, failure to deliver the goods would give the consignee the right to treat the goods as lost.

11. Applicability of the rules to actions in tort

These Rules apply to all claims against the MTO relating to the performance of the multimodal transport contract, whether the claim be founded in contract or in tort.

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12. Applicability of the rules to the multimodal transport operator's servants, agents and other persons employed by him

These Rules apply whenever claims relating to the performance of the multimodal transport contract are made against any servant, agent or other person whose services the MTO has used in order to perform the multimodal transport contract, whether such claims are founded in contract or in tort, and the aggregate liability of the MTO of such servants, agents or other persons shall not exceed the limits in Rule 6.

13. Mandatory law

These Rules shall only take effect to the extent that they are not contrary to the mandatory provisions of international conventions or national law applicable to the multimodal transport contract.